



IN THE

Supreme Court of the United States

October Term 1971

No. 71-507

WILFRED KEYES, et al.,

Petitioners,

v/s

SCHOOL DISTRICT No. 1, DENVER
COLORADO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING AND FOR STAY OF MANDATE

Respondents respectfully petition the Court for a rehearing on one of the two questions decided by the Court in its Opinion of June 21, 1973, namely, whether the courts below applied the correct legal standard in addressing petitioners' claims of state-imposed segregation in the core city schools; and as to that question, respondents seek rehearing only as to that part of the question relating to the shifting of the burden of proof discussed in Part III of the Opinion.

Respondents also request that the mandate be stayed until disposition of this petition.

Grounds for the Petition

1. Summary

The Opinion leaves doubt as to whether the school authorities have the burden of proving lack of segregative intent as to their actions prior to the intentionally segregative actions, first occurring in 1960, proven by the petitioners.

All precedent and authority hold that prior intentional acts are probative on the question of the intent associated with later acts. Yet the Opinion does not explicitly confine the effect of the burden-shifting principle to actions at or after the time of the proven intentional segregative acts.

Whether the respondents' burden of proof extends to school district actions prior to 1960, when the first segregative act, the building of Barrett School, was shown, will make a substantial difference, upon remand, in the scope of the proceedings, including the time required for trial preparation, the duration of the trial, and the expense to the school district. It will make the difference of whether the school district must carry the burden of proof respecting the intent of all of its actions for only the 14-year period extending back to 1959, or for a much longer period of at least twice that duration to the early 1940's when ethnic concentrations first began to appear in the Denver schools.

2. The Authorities and Precedents

All of the treatises and cases cited by the Court refer to prior or concurrent conduct. The touchstone for the burden-shifting rule is the

"... well-settled evidentiary principle that 'the *prior* doing of other similar acts, whether clearly

part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.' II Wigmore, Evidence 200 (3d ed. 1940)." (emphasis added) (Opinion, p. 17)

The example of the application of the principle from the criminal context (*Nye & Nissen v. United States*, 336 U.S. 613 [1949]) involved presentation of false invoices during the same period of time as the acts charged (332 U.S. at 618).

The school desegregation cases cited by the Court — *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and the teacher discharge cases — all involved a "history of segregation," which the Court expressly defines:

"Indeed, to say that a system has a 'history of segregation' is merely to say that a pattern of intentional segregation has been established in the past." (emphasis added) (Opinion, p. 20)

The Court then restates its holding, in the light of these authorities, as follows:

"Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of *subsequent or other* segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that *this* segregated schooling is not also the result of intentionally segregative acts." (emphasis added) (Opinion, p. 20)

The use of the words "subsequent or other," especially in light of the authorities cited, is consistent with the applicability of the shift of burden to subsequent or contemporaneous

situations, excluding prior segregated schooling from the operation of the burden-shifting rule.

3. The Application of the Rule by the Courts Below

The courts below clearly recognized that prior segregative acts have probative value on the issue of segregative intent with respect to later acts.

This Court commenced its discussion of the burden-shifting principle with the observation that the District Court had considered "past discriminatory acts . . . in assessing the causes of current segregation . . ." (emphasis added) (Opinion, n. 14, p. 16). The District Court had limited its consideration of the Park Hill actions in 1960 (building Barrett), 1962 and 1964 (boundary changes at Stedman and Hallett), and 1965 (mobile units at Stedman and Hallett), to the assessment of segregative purpose of the later 1969 acts (the repeal of the racial balancing resolutions). Thus, the limitation of the District Court's comment is *chronological*, not *geographical*.

When the Court of Appeals agreed with the District Court that the "petitioners had failed to prove" intentional discriminatory acts causing present racial imbalance in the core city schools, the Court of Appeals clearly limited the imposition of the burden on petitioners to the time period prior to 1960 when there were no prior segregative acts shown:

"Where, as here, the system is not a dual one, and where no type of state imposed segregation has *previously* been established, the burden is on plaintiff to prove by a preponderance of evidence that the racial imbalance exists and that it was caused by intentional state action. (emphasis added) (445 F. 2d at 1006, A.P. 148a)

4. The Structure of the Case and the Order of Events

The segregative acts in Park Hill occurred in the 1960's, as the Opinion notes (p. 8); but, with one exception, the Opinion nowhere identifies the time period in which the acts with respect to the core city schools took place. The exception is the reference to actions in the core city area antedating the 1954 decision in *Brown*, where the focus of the Opinion was on the attenuation of causal effect, as distinct from intent. (Opinion, p. 20)

Respondents believe that it is probable that the Court, in formulating the burden-shifting principle, misapprehended the order of events as between the Park Hill schools and the core city schools. This could easily have happened because the Park Hill evidence was presented at the first hearing in support of the first cause of action, and the trial court's opinions thereon were announced and reported first. The District Court discussed the Park Hill evidence in the first part of its opinion on the merits, and the Court of Appeals did likewise in its opinion. Petitioners, in their brief, consistently reversed the chronology in discussing the evidence and other aspects of the case, and discussed the Park Hill events first before turning to the earlier events in the core city area.

Actually, almost all of the actions of the school district with respect to the core city area took place in the 1950's, under wholly different school boards, ten years before the Park Hill events.

5. The Secondary Issue of Causal Attenuation

Nor does the discussion of causal attenuation (Opinion, pp. 20, 21) appear to carry the application of the burden-shifting principle back to actions taken prior to the period of proven intentional segregation. This is because the showing of causal attenuation comes into play as to those acts

which cannot be shown to lack segregative intent. (Opinion, p. 21) And such intent, by all authorities cited, can be inferred only on the basis of prior or contemporaneous segregative acts, and not on the basis of subsequent intentional acts many years later.

Conclusion

We are assured by Biblical authority that the iniquities of the fathers will not be visited on the children. Conversely, the Court should not visit the "sins" of one generation of school board members and administrators upon the men and women serving in such capacities in an earlier generation.

WHEREFORE, respondents respectfully pray that rehearing be granted on the question of whether proven discriminatory acts may be deemed probative on the issue of the segregative purpose of earlier acts, thus shifting the burden of proof as to such earlier acts. A resolution of this question is of substantial importance in determining the scope of the future conduct of this litigation.

This petition is filed after the Court has adjourned; respondents, accordingly, also respectfully request that the mandate of the Court be stayed until disposition of this petition, in the interests of orderly further proceedings below.

Respectfully submitted,

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CERTIFICATE

The undersigned, counsel for respondents, certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay, and that the petition is restricted to substantial grounds now available to respondents in view of the Opinion herein.

Attorneys for Respondents

END OF CASE